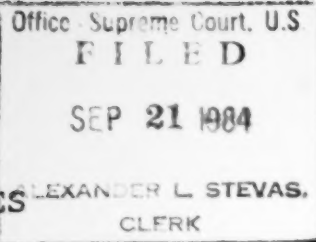


No. 83-2008



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DON RAY PHINNEY,

Petitioner,

vs.

FIRST AMERICAN NATIONAL BANK,

Respondent,

PETITIONER'S REPLY BRIEF
TO RESPONDENT'S OPPOSITION
TO PETITION FOR CERTIORARI

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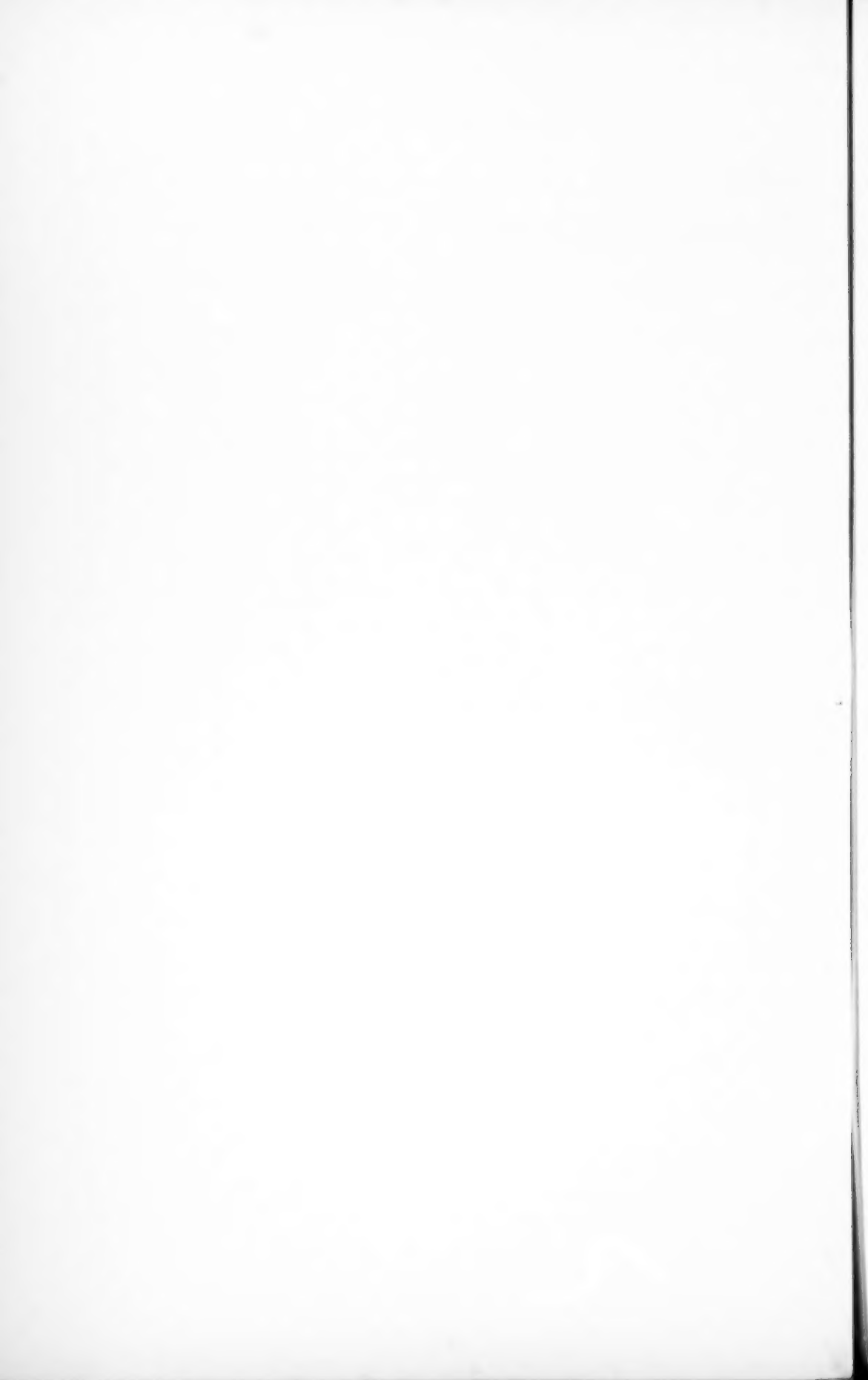
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PETITIONER'S REPLY BRIEF

Introductory Statement

Respondent, in its Brief in Opposition, incorporates the opinion of the original trial court's opinion granting Respondent's request for judgement notwithstanding the verdict in the trial between the parties. Brief In Opposition, p. 6. To respond to the new matter raised by the Brief in Opposition, and without waiving those matters in the Petition For Certiorari, this limited reply follows:

Argument

The trial court, in granting Respondent's motion for judgement notwithstanding the verdict, lists several items as the basis for finding that the evidence introduced at trial "points strongly in favor of the position of the defendant bank." Brief In Opposition, Apendix, p. 30.

The trial court noted that "Attorney General Shriver has in his possession some seventeen worthless checks..." Brief in Opposition, Appendix, p.32. This finding totally false. A review of the trial transcript reveals



that, while given the opportunity to do so, neither the Respondent Bank, nor Attorney General Shriver were able to produce any of the 12 checks in addition to those checks for which Petitioner was indicted and extradicted. Further, a review of Attorney General Shriver's testimony reveals that he was not aware that Petitioner had signed a note, prior to being indicted, for the five checks forming the basis of Petitioner's indictment and extradition. This evidence, or the lack thereof, gains heightened importance when viewed in light of Judge Wiseman's charge to the jury that to find for Petitioner, the jury had to find that Respondent committed fraud, forgery, and perjury in procuring Petitioner's indictment and extradition.

Most importantly, a review of the trial judge's opinion on the judgment notwithstanding the verdict reveals that the standard for ruling on the motion was violated in several ways: First, in the ruling, the trial court substituted its judgment for that of the jury; Second, the trial



court weighed the evidence adduced at trial; Third, the trial court passed on and determined the credibility of witnesses; Fourth, the trial court viewed the evidence (indeed, carefully selected evidence) in a light most unfavorable to the Petitioner, and drew all inferences against Petitioner; Fifth, the trial judge lists several items as "uncontroverted" facts when indeed these items were controverted during the four day jury trial between the parties. A trial court is not permitted to take such action in ruling on a judgment notwithstanding the verdict. See, Morelock v. NCR Corp., 586 F2d 1096 (6th Cir. 1978).

With the greatest respect to the trial court, a review of Judge Wiseman's opinion certainly gives the appearance of lack of impartiality. This appearance of lack of impartiality is fortified by the findings made by the District Court concerning Judge Wiseman's prior and then existing involvement with the Respondent Bank.

The trial judge was under a mandatory duty to recuse himself from the case. His failure to

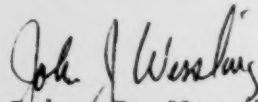


do so was an abuse of discretion requiring that appropriate action be taken to remedy the error and accomplish justice. The appropriate remedy it to reinstate the jury's verdict.

CONCLUSION

For the foregoing reasons, as well as for those reasons stated in the Petition For Certiorari, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals For The Sixth Circuit.

Respectfully submitted,



John J. Wessling
Attorney for Petitioner



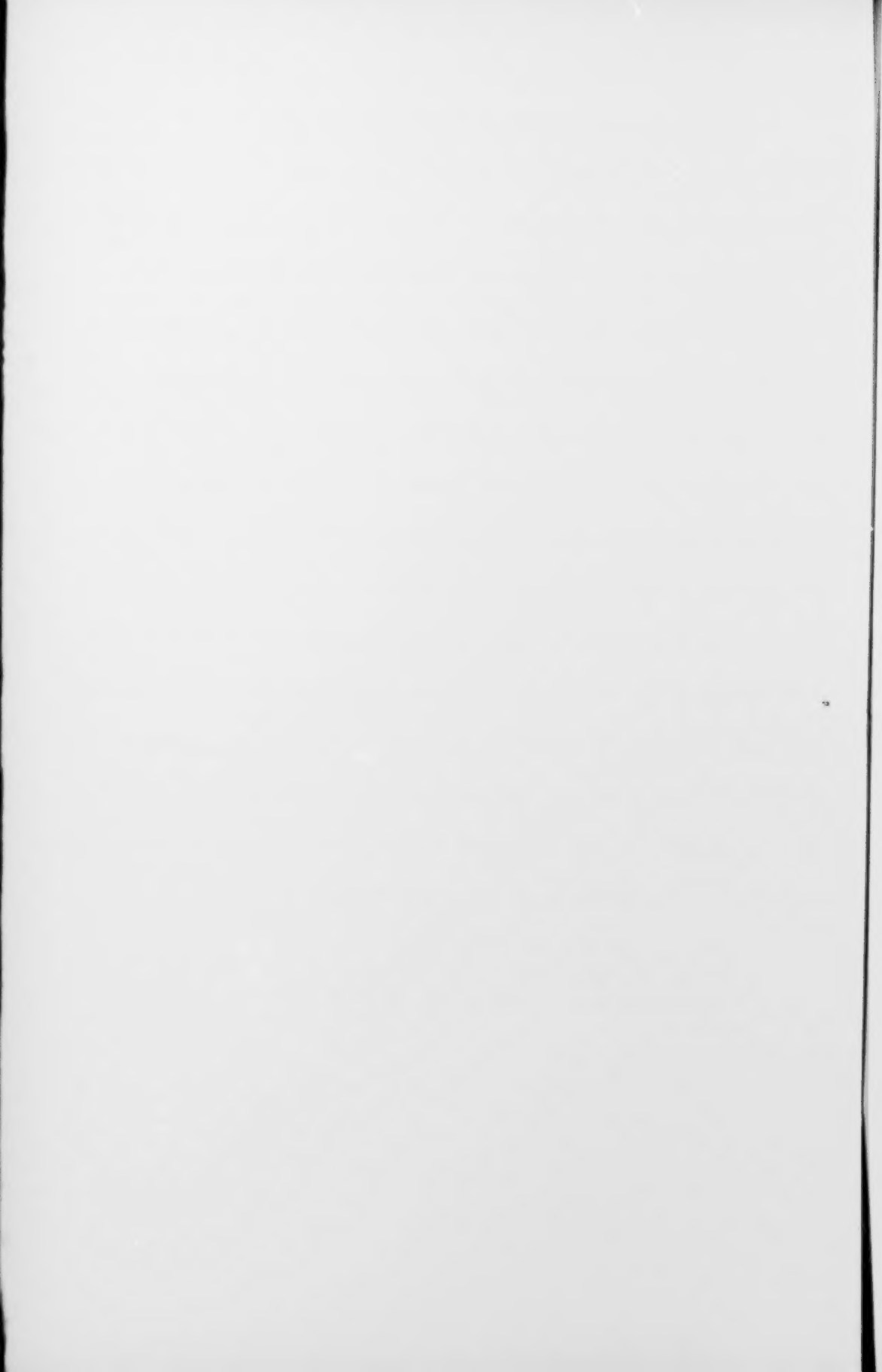
CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

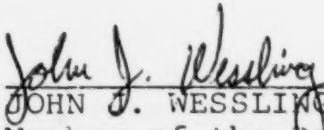
I am a citizen of the United States, a member of the Bar of the United States Supreme Court, and a resident of the county aforesaid. I am over the age of 18 years and not a party to the within entitled action; my business address is 221 East Walnut Street, Suite 110, Pasadena, California 91101.

On September **10**, 1984, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies in a sealed envelope, with postage thereon fully prepaid in the United State Mail in Pasadena, California, addressed as follows:

BASS, BARRY & SIMS
2700 First American Center
Nashville, Tennessee 37238



I certify under penalty of perjury that the foregoing is true and correct and was executed on SEP 20 1984 , at Pasadena, California.


JOHN J. WESSLING
Member of the Bar of the
United States Supreme
Court and Attorney for
Petitioner DON RAY PHINNEY